



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

May 10, 2022

Re: FOIA Request NLRB-2022-000463

Dear Nancy Silverman:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on January 25, 2022, in which you seek copies of the (1) sworn affidavits submitted in support or opposition to the complaint and amended complaint; (2) documentary evidence requests; (3) copies of documentary evidence submitted in response to requests in *Bridgewater Associates, LP*, Case No. 01-CA-167815. You agreed to assume financial responsibility for the processing of your request in the amount of \$250.00.

We acknowledged your request on January 25, 2022. As a result of several email exchanges with a member of my staff between March 23 and April 10, you consented to narrow the scope of your request to requests for evidence, the affidavits, and “anything else in the case file that is releasable.” In the most recent April 22, 2022 communication, you further questioned whether the affidavits should be withheld. We regret the delay in our final response.

Your request is granted in part and denied in part, as explained below.

We reasonably interpreted other “releasable” records as those that can be released without having to go through the business submitter process. The releasable records in this specific case are the formal records. Although the formal records in *Bridgewater Associates, LP*, Case No. 01-CA-167815 (16 pages) were already provided to you in response to FOIA Request ID. NLRB-2022-000427, we provide them again here for your convenience.

A search of FOIAonline, the Agency casehandling system, for NLRB-2022-000427 was conducted and located the attached 16-page FOIA response. An additional search of the Agency’s electronic casehandling system, NxGen, has conducted for remaining releasable record. In addition to the formal records, the NxGen search yielded the attached two-page request for evidence from the requested case file.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). The records are being provided to you either in their entirety or partially

redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Specifically, redactions have been made to the records to protect the privacy interests of individuals named therein. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) and (b)(7)(C).

To the extent you seek affidavits, affidavits obtained by the Regional Office during the investigation of a case are records protected from disclosure in full under FOIA Exemptions 6, 7(C), and 7(D), 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(D).

An individual's status as a union supporter or government informant or potential witness in an investigation is a protectable privacy interest under Exemptions 6 and 7(C). See, e.g., *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992) (persons including informants and third-parties mentioned in government files have a "strong" privacy interest in non-disclosure of their identities).

In addition, affidavits are protected from disclosure under FOIA Exemption 7(D). Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." See *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. See *Radowich v. U.S. Attorney, Dist. of Md.*, 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. See, e.g., *Jones v. FBI*, 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1068-69 (2d Cir. 1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv.*, 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any

affidavits which may be in the requested case file contain information provided to the Agency under an express promise of confidentiality, and accordingly, are exempt from disclosure under Exemption 7(D).

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

One hour of professional time was expended reviewing for release the requested material. Accordingly, please remit \$37.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Michael A. Maddox, the FOIA Attorney-Advisor who processed your request, at (202) 273-0013 or by email at Michael.Maddox@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

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After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (18 pages)